

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF SURFACE WATER)
APPLICATION NO. 22240 OF)
DOUGLAS G. WARREN,)
)
WILLARD E. REESE,)
)
Appellant,)
)
vs.)
)
DOUGLAS G. WARREN and)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
)
Respondents.)

PCHE No. 400

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

This matter, the appeal of a surface water application approved by the Department of Ecology to Douglas G. Warren, came before the Pollution Control Hearings Board (Walt Woodward, presiding officer, and Mary Ellen McCaffree) in a formal hearing in the Board's office at Lacey, Washington, at 1:30 p.m., October 23, 1973.

Appellant appeared through Frank Hallett; respondent Department of Ecology through Charles W. Lean, assistant attorney general. Respondent

1 Warren was present. Richard Reinertsen, Olympia court reporter,
2 recorded the proceedings.

3 Witnesses were sworn and testified. Exhibits were offered. Counsel
4 made closing arguments.

5 From testimony heard, exhibits examined and arguments considered,
6 the Pollution Control Hearings Board makes these

7 FINDINGS OF FACT

8 I.

9 In 1934, the Civilian Conservation Corps developed a small water
10 system from an unnamed creek for the use of a C.C.C. camp at Ariel,
11 Lewis County. On state-owned land, a 1,000-gallon tank was erected
12 about one-half mile downstream from the creek's origin at a spring. A
13 three-inch pipe diverted the creek water to the tank. When the camp
14 was disbanded in 1935, the C.C.C. donated its system to Harry Reese, who
15 had moved to the area with his family in 1933. In 1935, the system was
16 developed to serve four residences, including the Reese home, and a
17 small general store owned and operated by the Reese family, and has been
18 used for those purposes continuously since 1935.

19 II.

20 The creek goes dry during some, but not all, summers. Users of the
21 Reese system utilize nearby Speelya1 Creek when this occurs.

22 III.

23 Early in the 1940s, Harry Reese made inquiry of respondent's
24 predecessor agency regarding water rights. Appellant contends, but did
25 not prove, that his mother, Mrs. Elizabeth Ruston Reese, made formal
26 application and paid a five dollar fee for a surface water right of

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1 respondent's predecessor agency. The predecessor agency's correspondence
2 file for the early 1940s has been destroyed. There is no record in
3 respondent's files which go back to 1917 that Mrs. Reese made such an
4 application.

5 IV.

6 There is no record in respondent's files of the Civilian Conservation
7 Corps having made application for a surface water right for the water
8 system which it donated to Harry Reese.

9 V.

10 When respondent Warren moved to the Ariel area in 1968, he caught
11 the overflow from the Reese storage tank and developed a gravity-flow
12 system to furnish water for his residence. On May 21, 1970, he made
13 Application No. 22240 with the State Department of Ecology for the
14 withdrawal of 0.02 cubic feet per second (cfs) of water from the unnamed
15 creek under consideration in this matter. Application No. 22240 is
16 the first recorded for that unnamed creek by the State Department of
17 Ecology or its predecessor agencies.

18 VI.

19 Appellant and other users of the Reese system protested Application
20 No. 22240 unless Mr. Warren's withdrawal of water was limited to taking
21 only the overflow from the Reese tank. Subsequently, appellant and
22 others made Application No. 22496 with the State Department of Ecology
23 for the withdrawal of surface water from the instant unnamed creek.

24 VII.

25 Appellant "kicked" aside respondent Warren's overflow collector
26 pipe. After this, Mr. Warren withdrew water directly from the unnamed

1 creek at a point downstream from the Reese system withdrawal.

2 VIII.

3 On May 30, 1973, after two field examinations and the filing of a
4 written report and recommendation, the State Department of Ecology
5 approved the issuance of a surface water permit under Application
6 No. 22240 to respondent Warren. The permit was for the withdrawal of
7 0.01 cfs of water and was limited to a yearly total of one acre-foot.
8 A condition of the permit required Mr. Warren to withdraw his water
9 upstream of the Reese diversion point; the Department said this was
10 necessary from a water-management standpoint to give the first-in-time
11 applicant physical priority.

12 IX.

13 Management of the creek and a clear separation of the two withdrawa-
14 l systems would be served better if the Warren withdrawal is located at
15 least 100 feet upstream of the Reese diversion.

16 X.

17 The best solution of water problems affecting all litigants in this
18 matter would be the cooperative development of a community water system.

19 From these Findings, the Pollution Control Hearings Board comes
20 to these

21 CONCLUSIONS

22 I.

23 This community dispute over water from a small creek which
24 occasionally runs dry in the summer must center on who the first-in-
25 time applicant was (RCW 90.03.340). The Civilian Conservation Corps
26 was the original developer of the system, but it did not apply for a

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1 water right. A subsequent developer of the system was the Reese family.
2 There is no doubt that Mrs. Reese corresponded with the appropriate
3 state agency in the early 1940s relative to an appropriation application,
4 but there is no proof that the appropriation application was completed.
5 A record of such completed application is required (RCW 90.03.270), but
6 there is no record of a Reese application prior to May 21, 1970 when
7 respondent Warren made the first application of record for a surface
8 water withdrawal from the unnamed creek. This Board, therefore, must
9 find that respondent Warren is the first-in-time applicant and, as such,
10 has established his priority for appropriation.

11 II.

12 It follows that the approval of a permit under Application No. 22240
13 to respondent Warren was a valid action by the State Department of
14 Ecology. The Department's insistence that Mr. Warren's point of
15 withdrawal be upstream of the Reese diversion is reasonable from a
16 water-management standpoint. The Board further feels that Mr. Warren's
17 point of withdrawal should be upstream at least 100 feet from the
18 Reese diversion.

19 III.

20 The Board regrets it does not have statutory authority to require
21 the litigants in this matter to get together as reasoning and
22 cooperating adults to develop a community water system. Particularly
23 in the low-water periods of the summer this would appear to be a far
24 more sensible solution. The Board can only urge this horse-sense
25 approach to the problem.

26 Therefore, the Pollution Control Hearings Board issues this
27 FINDINGS OF FACT,
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ORDER

The appeal is denied and the surface water appropriation approved under Application No. 22240 is sustained with the additional condition that respondent Warren's point of withdrawal be at least 100 feet upstream of the Reese diversion.

DONE at Lacey, Washington this 29th day of October, 1973.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

Mary Ellen McCaffree
MARY ELLEN McCAFFREE, Member